

ALJ, in denying claimant's claim for compensation, found that the marijuana use contributed to the accident.

The claimant requests review of whether the ALJ erred in relying on opinions or testimony elicited as a result of the inadmissible drug test and whether the ALJ erred in using Dr. Parmet's opinion as reasonable medical evidence. Claimant argues that the respondent has not sustained its burden of proof that claimant was impaired at the time of the accident. Consequently, claimant argues he is entitled to medical treatment and temporary total disability benefits as a result of his work-related accident.

Respondent argues the ALJ's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

The issue regarding whether drug consumption contributed to an injury, disability or death, thus allowing denial of liability under K.S.A. 44-501(d)(2) is a certain defense under K.S.A. 44-534a and subject to review by the Board from a preliminary hearing order.

While it is the claimant's burden to establish his right to an award of compensation by proving all of the various conditions on which the claimant's right depends by a preponderance of the credible evidence, it is the respondent's burden to establish an affirmative defense such as a contribution due to impairment from drugs.

As previously noted, it was undisputed that claimant was injured at work when the front loader he was operating fell 18 feet off the earth shelf where he was working. Claimant was taken to the emergency room and diagnosed with a fractured left clavicle.

At an evidentiary deposition, the claimant testified, without objection, that a urine sample taken at the hospital emergency room came back positive for marijuana. Claimant explained that he regularly smoked marijuana approximately three or four days a week. Claimant further admitted that he smoked marijuana on the evening before the work-related accident.

At the preliminary hearing, the respondent proffered, over objection, the report of Dr. Allen J. Parmet. The doctor's report noted the results of the urine drug test and commented on the levels detected. The report also referred to claimant's testimony at the evidentiary deposition regarding what time claimant smoked marijuana the evening before the accident as well as claimant's testimony regarding his smoking marijuana three to four times a week. The doctor then noted that marijuana use impacts activities such as claimant's driving the front loader and that to a reasonable degree of medical certainty claimant was impaired due to marijuana use at the time of the accident. The report noted:

Marijuana contains approximately 25 chemicals known as cannabinoids. These drugs are psychoactive as are many of their metabolites. For a single dose of marijuana, researchers have demonstrated impairment for work related activities up to 12 hours afterwards. Particularly impacted are attentional activates [sic] such as multi-tasking, that is dividing one's attention between two activates, [sic] which in this case would be both driving a vehicle and remaining aware of its location. Some research has demonstrated impairment for high-level cognitive functions for as long as 24 hours, but this entails sophisticated activities such as piloting an airplane. Chronic use of marijuana is held to prolong all degrees of impairment due to the sustained levels of the active drugs and metabolites for an extended period.

This information confirms that Mr. Shaffer was using marijuana on a chronic basis and within 12 hours of his occupational injury. The scientific data set supports the finding that, to a reasonable degree of medical certainty, impairment due to marijuana abuse existed at the time of Mr. Shaffer's accident.²

The ALJ determined the results of the urine drug test were not admissible. But the ALJ further denied the claim finding claimant's testimony coupled with Dr. Parmet's report established that claimant was impaired at the time of the accident as a result of his admitted use of marijuana the evening before the accident.

Claimant argues that the doctor's report is tainted because it was generated with knowledge of the urine drug test findings which the ALJ ruled were not admissible. The difficulty with claimant's position is that the doctor was also provided claimant's testimony from the evidentiary deposition regarding the frequency of claimant's marijuana usage and the doctor's report regarding the effects of such usage was not limited to the results of the urine drug test.

The doctor specifically noted that multi-tasking, such as operating the front loader, would be impacted for at least 12 hours after using marijuana and with chronic use the time is extended. Claimant admitted he used marijuana within 12 hours of the accident. Finally, the doctor specifically noted claimant was impaired at the time of the accident. Because such impairment impacted the ability to operate the front loader, such impairment contributed to the accident. The Board affirms the ALJ's Order denying benefits.

WHEREFORE, it is the finding of the Board that the Order of Administrative Law Judge Kenneth J. Hursh dated September 17, 2004, is affirmed.

IT IS SO ORDERED.

² P.H. Trans., Resp. Ex. B.

Dated this _____ day of November 2004.

BOARD MEMBER

c: Dawn C. Counter, Attorney for Claimant
David Bogdan, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director